

A

**Quan Kim Hock v
Timbalan Menteri Dalam Negeri & Ors**

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44-38
OF 1999

NIK HASHIM J

B

3 NOVEMBER 1999

Criminal Procedure — Habeas corpus — Detention of drug dependents — Order issued under Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6(1)(a) — Whether recommendation of rehabilitation officer must be followed — Whether opportunity to make representation must be given — Whether doctor who signed medical certificate must indicate capacity as government medical officer or registered medical practitioner — Whether must state name of drugs used — Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6(1)(a) & (b)

C

D

E

The applicant was arrested and on 8 September 1999 ordered to undergo treatment at the Pusat Pemulihan Serenti Gambang, Pahang for two years and thereafter to undergo supervision of a rehabilitation officer for another two years under s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant applied for a writ of habeas corpus. The applicant, inter alia, argued that the learned magistrate had failed to: (i) hold an inquiry in the presence of his counsel; (ii) ensure the types of dangerous drugs were mentioned in the medical certificate ('the certificate'); and (iii) give the applicant an opportunity to make representations.

Held, allowing the application:

F

G

H

I

- (1) The magistrate's order on a drug dependant under s 6(1)(a) or (b) of the Act cannot be lawfully made unless: (i) the person to be ordered to undergo treatment under s 6(1)(a) or supervision under s 6(1)(b) of the Act is certified by a government medical officer or a registered medical practitioner to be a drug dependant; (ii) the magistrate must act on the recommendation of a rehabilitation officer; and (iii) an opportunity to make representations must be given to the person before the magistrate makes the order (see p 69B-D).
- (2) The certificate was defective and invalid as the doctor who signed the certificate did not indicate clearly in it whether he was certifying it in his capacity as a government medical officer or a registered medical practitioner (see p 71B-C). The doctor also failed to name the drug or drugs, through the use of which the applicant became a drug dependant (see p 71E).
- (3) The proceeding before the magistrate on 8 September 1999 was in fact an inquiry fixed and conducted for the purpose of s 6 of the Act (see p 72A). However, since the magistrate's order under s 6(1)(a) was contrary to the rehabilitation officer's recommendation which was under s 6(1)(b), it was therefore unlawful (see p 72F). Further, by failing to give the applicant an

opportunity to make representations, the learned magistrate was in breach of the statutory provision and hence, his order could not be held to be valid (see p 73B–C).

A

Per curiam:

The court is duty bound in an application for habeas corpus where a liberty of a person is involved, to go beyond the stated grounds of the applicant and examine the record of inquiry in order to satisfy itself that the order made by the magistrate under the Act is in accordance with the law (see p 72H).

B

[Bahasa Malaysia summary

C

Pemohon telah ditangkap dan pada 8 September 1999 diperintahkan untuk menjalani rawatan di Pusat Pemulihan Serenti Gambang, Pahang selama dua tahun dan kemudiannya untuk menjalani pengawasan di bawah seorang pegawai pemulihan selama dua tahun lagi di bawah s 6(1)(a) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta tersebut'). Pemohon telah memohon untuk satu writ habeas corpus. Pemohon, antara lain, menghujahkan bahawa majistret yang bijaksana telah gagal untuk: (i) menjalankan satu siasatan di dalam kehadiran peguam beliau; (ii) memastikan jenis-jenis dadah berbahaya disebutkan di dalam sijil perubatan ('sijil tersebut'); dan (iii) memberi pemohon peluang untuk membuat representasi.

D

E

Diputuskan, membenarkan permohonan tersebut:

- (1) Perintah majistret terhadap seorang penagih dadah di bawah s 6(1)(a) atau (b) Akta tersebut tidak boleh dibuat secara sah kecuali: (i) orang yang diperintahkan untuk menjalani rawatan di bawah s 6(1)(a) atau pengawasan di bawah s 6(1)(b) Akta tersebut telah disahkan oleh seorang pegawai perubatan kerajaan atau seorang pengamal perubatan berdaftar sebagai seorang penagih dadah; (ii) majistret sepatutnya bertindak atas nasihat seorang pegawai pemulihan; dan (iii) satu peluang untuk membuat representasi patut diberikan kepada orang itu sebelum majistret membuat perintah tersebut (lihat ms 69B–D).
- (2) Sijil tersebut adalah cacat dan tidak sah kerana doktor yang menandatangani sijil tersebut tidak menyatakan dengan jelas sama ada beliau mengesahkannya di dalam tugasnya sebagai seorang pegawai perubatan kerajaan atau seorang pengamal perubatan berdaftar (lihat ms 71B–C). Doktor tersebut juga telah gagal untuk menamakan dadah atau dadah-dadah tersebut, melalui kegunaan di mana pemohon telah menjadi seorang penagih dadah (lihat ms 71E).
- (3) Prosiding di hadapan majistret pada 8 September 1999 sememangnya satu siasatan yang telah ditetapkan dan dijalankan

F

G

H

I

- A** bagi tujuan s 6 Akta tersebut (lihat ms 72A). Namun begitu, memandangkan perintah majistret di bawah s 6(1)(a) adalah bertentangan dengan nasihat pegawai pemulihan tersebut di bawah s 6(1)(b), ia adalah menyalahi undang-undang (lihat ms 72F). Tambahan pula, memandangkan kegagalan untuk memberikan pemohon satu peluang untuk membuat representasi,
- B** majistret yang bijaksana telah melanggar peruntukan statutori dan justeru itu, perintah beliau tidak boleh diputuskan sebagai sah (lihat ms 73B–C).

Per curiam:

- C** Mahkamah mempunyai kewajipan di dalam satu permohonan untuk habeas corpus yang melibatkan kebebasan seseorang, untuk melampaui batas alasan-alasan yang telah dinyatakan oleh pemohon dan memeriksa laporan siasatan agar memuaskannya beliau bahawa perintah yang dibuat oleh majistret di bawah Akta tersebut adalah menurut undang-undang (lihat ms 72H).]
- D**

Notes

For cases on detention of drug addict, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1513–1516.

E

Cases referred to

Kamaruzaman bin Yahaya v Menteri Hal Ehwal Dalam Negeri, Malaysia [1997] 5 MLJ 256 (refd)
Sanuar Kamaruddin bin Ahmad v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1996] 5 MLJ 1 (refd)

F

Legislation referred to

Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6(1)(a), (b)

G

Drug Dependants (Treatment and Rehabilitation) Rules 1998, Schedule, Form 2

Richard Bong (Bong & Co) for the applicant.

Mohd Abazafree bin Mohd Abas (Federal Counsel) for the respondents.

Cur Adv Vult

H

Nik Hashim J:

The application

I

The applicant, a 38 year old man earning RM7,500 per month as proprietor of a kejuruteraan besi, was arrested on 9 August 1999, and on 8 September 1999 was ordered to undergo treatment at the Pusat Pemulihan Serenti Gambang, Pahang for two years and thereafter to undergo supervision of a rehabilitation officer for another two years under s 6(1)(a) of the Drug

Dependants (Treatment and Rehabilitation) Act 1983 ('the Act') as amended by the Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1998 (Act A1018) which came into force on 1 September 1998 vide PU (B) 329 dated 27 August 1998. The applicant made an application for a writ of habeas corpus on the following grounds contending that the learned magistrate had failed to:

- (a) hold an inquiry in the presence of his counsel;
- (b) ensure the types of dangerous drugs mentioned in the medical certificate;
- (c) fix a date for inquiry and to call witnesses to give evidence; and
- (d) give the applicant an opportunity to make representations.

It is to be noted at the outset that the respondents have not filed any affidavits in reply. The learned federal counsel for the respondents merely relied on the record of inquiry as the basis for his argument against the application.

Section 6

As adverted to earlier, the Act was amended by the Act A1018. The magistrate's order which may be made on a drug dependant is now governed by the new s 6 of the Act which states:

- (1) Where a person who has undergone the tests referred to in s 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations —
 - (a) order such person to undergo treatment at a Rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or
 - (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.
- (2) An order of supervision imposed on a person under paras (a) and (b) of sub-s (1) shall contain the following conditions:
 - (a) the person must reside in a State or Federal Territory or any area as specified in the order;
 - (b) the person must not leave the area where he resides without the written permission of the Director General;
 - (c) at the time specified in the order, the person shall report at the nearest police station or for a member of the armed forces at the place specified by an officer;
 - (d) the person shall not consume, use or possess any dangerous drugs;
 - (e) the person shall undergo such tests at such time and place as may be ordered by an officer; and
 - (f) the person shall undergo any programme for the rehabilitation of drug dependants held by the Government.

- A** (3) any person undergoing supervision under para (a) or (b) of sub-s (1) who fails to comply with any condition imposed under sub-s (2) shall be guilty of an offence and shall on conviction be liable to be punished with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both.

B *The conditions precedent under s 6*

Though s 6 was amended, its character remained unchanged by the amendment. Its provision is still penal in nature, affecting the freedom of an individual. As such, its provision must be construed strictly. What is clear from the above provision is that, the magistrate's order on a drug dependant under s 6(1)(a) or (b) cannot be lawfully made unless the following conditions precedent are strictly complied with:

- C** (1) The person to be ordered to undergo treatment (s 6(1)(a)) or supervision (s 6(1)(b)) is certified by a government medical officer or a registered medical practitioner to be a drug dependant;
- D** (2) The magistrate must act on the recommendation of a rehabilitation officer; and
- (3) An opportunity to make representations must be given to the person before the magistrate makes the order.

E Thus, under the new provision, the conditions precedent under the pre-amended s 6 of the Act as listed in *Sanuar Kamaruddin bin Ahmad v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1996] 5 MLJ 1, are now reduced accordingly.

Apart from the condition precedent (2), the other two conditions precedent (1) and (3) are not new.

F *The importance of a valid medical certificate*

The need for a valid medical certificate is obvious. The certificate to drug dependency must be in the form of Form 2 as specified in the Schedule to the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1998 ('the Rules').

G Form 2 provides:

FORM 2
Drug Dependants (Treatment And Rehabilitation) Act 1983
(Sub-s 6(1))

H CERTIFICATE AS TO DRUG DEPENDENCY

To:
The Magistrate,
Magistrate's Court,
.....

I I,..... a *government medical officer/
registered medical practitioner, having carried out the necessary tests upon
..... Identity Card No. aged years
of..... certify that he *is/is not a drug dependant within the meaning of

the Act. **The dangerous drug/drugs through the use of which he became a drug dependant *is/are
.....

A

Dated.....

.....
*Medical Officer/Registered Medical Practitioner (Official Stamp)

B

c.c.:
Rehabilitation Officer.....

*Delete whichever is not applicable.
**Delete if the person is not a drug dependant or if it is not determinable what type of drug he is dependent upon.

C

From the above, it is clear that Form 2 is self-explanatory. There must be positive proof that the certificate was so signed by a government medical officer or a registered medical practitioner (see *Kamaruzaman bin Yahaya v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1997] 5 MLJ 256). Besides, the dangerous drug or drugs through the use of which the person became a drug dependant must be stated in the space provided for in Form 2. If it is not determinable what type of drug he is dependent upon, then the relevant sentence must be deleted accordingly.

D

In the present case, Borang 2 (Form 2) was stated in the following manner:

E

Borang 2
Akta Penagih Dadah (Rawatan Dan Pemulihan) 1983
(Subseksyen 6(1))
Perakuan Tentang Penagihan Dadah

F

Kepada:
Majistret,
Mahkamah Majistret,
Temerloh.

Saya, Dr Tharvinder Singh s/o Sadhu Singh, seorang *pegawai perubatan kerajaan/pengamal perubatan berdaftar, setelah menjalankan ujian-ujian yang perlu ke atas Quan Kim Hock, K/P No 610503-10-5823 berumur 38 tahun yang beralamat di No 68, Taman Dahlia, Temerloh, Pahang Darul Makmur memperakui dia *ialah/bukan seorang penagih dadah mengikut pengertian Akta. **Dadah/dadah-dadah berbahaya yang digunakan yang menyebabkan dia menjadi seorang penagih dadah ialah

G

Bertarikh: 25 Ogos 1999

H

Catitan:
Urine Morfin - Positive
Impression: Drug Addict

.....
*Pegawai Perubatan/Pengamal Perubatan Berdaftar
Pegawai Perubatan
Hospital Mentakab.

I

A

s.k.

Pegawai Pemulihan

* Potong mana yang tidak berkenaan.

** Potong jika orang itu bukannya seorang penagih dadah atau jika tidak dapat ditentukan apakah jenis dadah yang diketagih olehnya.

B

The effect of non-compliance with Form 2

C

D

In my view, the certificate in the Borang 2 above was defective and invalid, and therefore, the learned magistrate could not rely upon it to make the order as he did for two reasons. Firstly, the doctor who signed the certificate did not indicate clearly in it whether he was certifying it in his capacity as a government medical officer or a registered medical practitioner. He could not be both at the same time. Therefore, he should delete the provision which was not applicable to him. In the instant case, he failed to delete the words that were not attributed to him. Without the deletion to indicate that he was a government medical officer and without the word 'kerajaan' after the words 'pegawai perubatan' in the official stamp, the medical certificate on the applicant so signed by the doctor in the Borang 2 above could not therefore be accepted as a valid medical certificate for the purpose of s 6(1) of the Act.

E

Secondly, the doctor failed to name the drug or drugs, through the use of which the applicant became a drug dependant. This was one of the grounds relied upon by the applicant in his application for habeas corpus.

F

G

H

I

On these two matters, the learned federal counsel for the respondents argued that the defects in the medical certificate were only in form and submitted that the certificate was still valid in substance. With respect, I did not agree with him. The medical certificate is very important. Without it, an order under s 6 would not be possible. Thus, it is crucially important that the medical certificate must be valid in law, and in order to be one, it must be self-sufficient, free from any defects, certain in its terms, and above all, it must not contain any further statement other than required in Form 2 or Borang 2 which might appear to be doubtful and contradictory with the contents of the certificate. Take for example in this case. The certifying doctor had put ' - ' to indicate that the applicant was not dependent upon any particular dangerous drug, yet under the 'Catitan' he had stated: 'Urine Morfin - Positive'. This statement 'Urine Morfin - Positive' appears to be contradictory to ' - ' in the certificate that the applicant was not dependent upon any dangerous drug. Furthermore, the words 'Impression: Drug Addict' under 'Catitan' makes the certificate doubtful whether the applicant was really a drug dependant. If indeed the doctor had actually certified in the certificate that the applicant was a drug dependant then, to my mind, there is absolutely no necessity anymore for the doctor, unless he was doubtful, to further state his impression on the applicant under the *catitan*. The 'catitan' was confusing rather than helpful. As such, I found the medical certificate defective and its defects though technical in nature, were substantial and indeed fatal to the validity of the learned magistrate's order.

Grounds (a) and (c)

A

With regard to grounds (a) and (c) of the application, I held that they were of no merit. The proceeding before the magistrate on 8 September 1999 was in fact an inquiry fixed and conducted for the purpose of s 6 of the Act. Therefore, the applicant had no cause for complaints on those grounds (see note of inquiry at A2 p 3).

B

Mandatory for magistrate to comply with rehabilitation officer's recommendation

The condition precedent (2) as listed above is new under s 6 of the Act. By its provision, it is now mandatory and thus obligatory on the part of the learned magistrate to comply with the recommendation of the rehabilitation officer ('the RO') in making the order either under s 6(1)(a) or (b) of the Act. Under the section, the learned magistrate has no longer any choice but to give effect to the RO's recommendation. I find support for the above view from the explanatory statement for the amendment of s 6 in the Drug Dependents (Treatment and Rehabilitation) (Amendment) Bill 1997 which reads:

C

D

- 4 Clause 4 seeks to amend s 6 so that if a rehabilitation officer recommends that a person should be ordered to reside at a rehabilitation centre or to undergo supervision by an officer, the magistrate before whom the person is produced or appears *must* make such order. (Emphasis added.)

In this case, the RO in his report at 'A 5' had recommended:

E

Adalah disyorkan supaya subject diletakkan di bawah pengawasan seorang pegawai menurut s 6(1)(b) Akta Penagih Dadah (Rawatan dan Pemulihan) (Pindaan) 1998, di Daerah Temerloh Negeri Pahang selama dua tahun.

The learned magistrate, contrary to the recommendation, made the order under s 6(1)(a) of the Act instead, (see Borang 3 and notes of magistrate's inquiry at A 2 p 3). This order was indeed against the very words 'Dan bahawasanya *atas syor Pegawai Pemulihan* ... which appeared in the Magistrate's order in *Borang 3*. Since, the magistrate's order under s 6(1)(a) was contrary to the RO's recommendation which was under s 6(1)(b), it was therefore unlawful for not being in compliance with the law.

F

G

The court to go beyond the grounds to ensure validity of order

Though the ground for failing to give effect to the RO's recommendation and the other pertaining to the medical certificate which was not certified either by a government medical officer or a registered medical practitioner were not pleaded as the grounds for the application, this court nevertheless, in its view, is duty bound in an application for habeas corpus, where a liberty of a person is involved, to go beyond the stated grounds and examine the record of inquiry in order to satisfy itself that the order made by the magistrate under the Act is in accordance with the law. Where the order cannot be held to be in accordance with the law, the order is bad and the person ordered to undergo treatment at a rehabilitation centre or supervision by an officer is entitled to be released forthwith.

H

I

A *The opportunity to make representations*

Finally, learned counsel for the applicant complained that the applicant was not given an opportunity to make representations in this case. To my mind, the complaint was justified.

- B** Making representations means the right to protest ie the right to challenge whatever is being brought against him. In the present case, there was no indication in the inquiry note whatsoever that the applicant was given an opportunity to make representations. What was stated in the note was 'subject hadir – tiada aduan.' 'Tiada aduan' means that the applicant had no complaints to make. But 'aduan' is not 'representation'. Thus, by failing to give the applicant an opportunity to make representations, the
- C** learned magistrate was in breach of the statutory provision and hence, his order could not held to be valid.

Conclusion

- D** For the above reasons, I allowed the application and ordered that the applicant be released forthwith.

Application allowed.

Reported by Benjamin Yong

E

F

G

H

I